

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM J. FRIED : CIVIL ACTION  
: NO. 96-3794  
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:  
v. :  
:  
MARTIN F. HORN, ET AL. :  
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BRODY, J.

September 3, 1997

MEMORANDUM AND ORDER

William J. Fried petitioned for a writ of habeas corpus pursuant to 28 U.S.C. §2254, as amended by the Anti-terrorism and Effective Death Penalty Act of 1996. In his habeas corpus petition, Mr. Fried challenged his state criminal conviction on the bases that: (1) he was denied due process because there was insufficient evidence to justify the verdict; (2) he was denied due process and the right to a fair trial because of the admission of evidence regarding other alleged sexual misconduct; (3) he was denied due process and the right to a fair trial

because of the exclusion of evidence regarding the dismissal of prior charges against him; and (4) he received constitutionally ineffective assistance of counsel where counsel failed to file a notice of alibi defense pursuant to state law.

William J. Fried's petition for writ of habeas corpus is denied on all grounds for the following reasons.

The complainant, David Maynard, an eleven year old member of Boy Scout Troop #124, alleged that petitioner, William J. Fried, the Scoutmaster of Boy Scout Troop #124, committed the alleged crimes on two separate Boy Scout camping trips.

David Maynard alleged that on a camping trip to Camp Laughing Waters, on January 7, 1989, he was alone with William Fried in the camp cabin from 3 to 5 p.m. During this time period, William Fried had David Maynard perform oral genital sex on him, and then performed the same act on David Maynard.

David Maynard alleged that on a second camping trip, to Camp Hart, on March 11, 1989, he was again alone with William Fried in the cabin between 3 and 5 p.m. During this time period, David Maynard alleged that William Fried had Maynard perform oral genital sex on him, and then performed the same act on the Complainant.

David Maynard did not tell anyone about these incidents until several months after they allegedly occurred.

In October of 1991, the Commonwealth of Pennsylvania charged William J. Fried with involuntary deviate sexual

intercourse, statutory rape, corrupting the morals of a minor, and indecent assault. Mr. Fried waived his right to a jury trial and was tried before Judge Albert R. Subers in the Court of Common Pleas, Montgomery County, Pennsylvania.

During the course of the trial, defense witness Stuart Rudnick testified for a number of hours on August 12, 1992. The following morning, the attorney for the Commonwealth motioned to exclude his testimony because trial counsel had failed to file a notice of Alibi Defense, as required by Pa. R. Crim. P. 305. After prolonged discussion, in the course of which Mr. Fried's trial counsel argued that this testimony went to opportunity rather than alibi, and, therefore, no notice was required, Judge Subers granted the motion, striking Mr. Rudnick's testimony as to Mr. Fried's whereabouts at the time the alleged incidents took place, and precluding future witness testimony on this topic. Throughout the remainder of the trial, Judge Subers sustained the Commonwealth's objections whenever defense counsel tried to elicit witness testimony on alibi.

After a six-day bench trial, Judge Subers convicted Mr. Fried, without considering any alibi evidence. The trial court denied all of Mr. Fried's posttrial motions on August 12, 1993.<sup>1</sup>

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1. Mr. Fried filed the following post-trial motions: (1) the verdict of guilty of indecent assault was not supported by the evidence; (2) the verdict of guilty of indecent exposure was not supported by the evidence; (3) the verdicts of guilty of statutory rape, corrupting the morals of a minor, indecent assault, involuntary deviate sexual intercourse, and indecent exposure for the incident at Camp Laughing Waters were against  
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Judge Subers sentenced Mr. Fried to 5 to 10 years in a state correctional institution for involuntary deviate sexual intercourse, 5 years probation for statutory rape to run consecutively to the parole received on the 5 to 10 year sentence, 2 years probation on corrupting the morals of a minor, to run concurrently to the 5 year probationary period for statutory rape, and 1 year probation for indecent assault, to run concurrently to the other probationary periods.

The Superior Court affirmed the trial court's judgment in a published memorandum opinion, without engaging in detailed

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1. (...continued)

the weight of the evidence; (4) the verdicts of guilty of statutory rape, corrupting the morals of a minor, indecent assault, involuntary deviate sexual intercourse, and indecent exposure for the incident at Camp Hart were against the weight of the evidence; (5) the Court's verdicts regarding both alleged incidents were against the weight of the evidence because they relied upon the alleged "common scheme, plan or design" evidence; (6) the Court's verdicts regarding both alleged incidents were against the weight of the evidence because the Court ignored the evidence of the defendant's character witnesses; (7) the Court erred in admitting evidence of alleged other sexual misconduct by the defendant; (8) the Court erred in striking the alibi evidence of Stuart Neil Rudnick; (9) the Court erred in denying the defendant's motions for pretrial discovery; (10) the Court erred in excluding evidence that similar charges brought by the Complainant against the defendant had been dismissed; (11) the Court erred in restricting testimony and cross-examination regarding the Complainant's prior sexual behavior; and (12) the Defendant did not receive constitutionally effective assistance of counsel from his trial counsel because of counsel's failure to file specific posttrial motions, failure to file a notice of alibi defense, failure to request a continuance for investigation of the alibi defense, failure to file certain pretrial motions in a timely fashion, failure to raise certain discovery issues, failure to seek admission of certain evidence regarding the Complainant, and failure to raise and preserve the issue of hypnosis in his posttrial motions. See "Defendant's Supplemental Post-Verdict Motions," filed in the Court of Common Pleas, Montgomery County, Pennsylvania, February 16, 1993.

analysis. The Supreme Court of Pennsylvania denied defendant's Petition for Allowance of Appeal on November 30, 1995. The Supreme Court of the United States denied a Petition for Writ of Certiorari.

Mr. Fried then filed this Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. Magistrate Judge Arnold C. Rapoport issued a Report and Recommendation that the petition be denied.

I found that Petitioner's first three grounds for habeas corpus relief were not exhausted at the state court level, because he raised them only as violations of state law --- that the trial court erred in reaching a verdict that was against the weight of the evidence; that the trial court erred in admitting and considering evidence of other alleged instances of sexual misconduct by the Defendant; and that the trial court erred in excluding evidence regarding the dismissal of prior charges against the Defendant --- in his state court appeals, and not as violations of his federal constitutional rights.<sup>2</sup> Therefore, pursuant to the Supreme Court's decision in Duncan v. Henry, 513 U.S. 364 (1995), which requires that state courts have the opportunity to remedy a state court violation of federal constitutional rights, I am unable to grant a Writ of Habeas Corpus on these bases.

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2. See footnote 1, supra, for a complete listing of Mr. Fried's grounds for appeal at the state court level.

Petitioner's fourth ground for habeas corpus relief, ineffective assistance of counsel, had been raised as a violation of his federal constitutional rights at the state court level. Because a reasonable possibility existed that defense counsel's representation fell below the standard of prevailing professional norms, and that prejudice had ensued from counsel's failure to file the notice of alibi defense, I granted an evidentiary hearing concerning the application of Strickland v. Washington, 466 U.S. 668 (1984), to Mr. Fried's petition for habeas corpus. I provide my findings below.

I deny the first three grounds of petitioner's habeas corpus petition, because, as discussed above, they were not exhausted at the state court level.

I found that the fourth ground, the claim of ineffective assistance of counsel merited an evidentiary hearing.<sup>3</sup> Petitioner had raised the issue of prejudice ensuing

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3. On August 27, 1997, I issued an order regarding the evidentiary hearing that directed, in pertinent part:

**IT IS ORDERED** that at the evidentiary hearing scheduled to take place on September 2, 1997, at 10:00 a.m., oral argument shall be presented on the application of Strickland v. Washington, 466 U.S. 668 (1984) to the habeas corpus writ at issue.

The determination of whether petitioner Fried was denied effective assistance of counsel is governed by the Supreme Court's decision in Strickland. Accordingly, to prevail on his claim, petitioner must show that (1) his trial counsel's representation fell below an objective standard of reasonableness (id. at 687-88), and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the

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from his defense counsel's failure to file the notice of alibi defense in the course of his state court appeals. Judge Subers had heard Mr. Rudnick's alibi testimony before striking it, on the Commonwealth's motion, and, therefore, was able to evaluate its impact when considering Mr. Fried's posttrial motions. Judge Subers specifically ruled that he was not prejudiced by the exclusion of alibi evidence, neither Mr. Rudnick's nor that of other potential witnesses, because Mr. Fried was permitted to present evidence as to the whereabouts of the victim, David Maynard. In accordance with the Supreme Court's decision in Strickland, I reviewed the trial court's finding regarding ineffective assistance of counsel as a mixed question of law and fact. 466 U.S. at 698.

On September 2, 1997, I conducted an evidentiary hearing concerning the application of Strickland v. Washington, 466 U.S. 668 (1984), to this habeas corpus petition. Strickland

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3. (...continued)

proceeding would have been different (id. at 694).

The court will hear argument on the first prong of Strickland, specifically, whether trial counsel's failure to file a notice of alibi defense, pursuant to Pa.R.Crim. P. 305, was unreasonable considering all the circumstances. Any evidence concerning trial counsel's rationale for failing to file a notice of alibi defense should be presented at this time.

The court will also hear argument relating to the second prong of Strickland, namely, whether counsel's representation "prejudiced the defense" by depriving the petitioner of a "fair trial, a trial whose result is reliable." Id. at 687. The court will hear what testimony would have been presented, had trial counsel filed a notice of alibi defense. The court will then hear argument on whether there is a reasonable probability that this testimony, if heard, would have brought about a different result. Id. at 694.

governs the determination of whether petitioner Fried was denied effective assistance of counsel due to his trial counsel's failure to file a notice of alibi defense pursuant to Pa.R.Crim.P. 305. Strickland analysis consists of two separate parts, both of which must be satisfied in order to find ineffective assistance of counsel: (1) trial counsel's representation must fall below an objective standard of reasonableness (466 U.S. at 687-88); and (2) a reasonable probability must exist that, but for counsel's unprofessional errors, the result of the proceeding would have been different (466 U.S. at 694).

During the evidentiary hearing, I allowed testimony as to what alibi evidence would have been presented at trial, had trial counsel filed a notice of alibi defense. No testimony was presented at the hearing sufficient to provide petitioner Fried with an alibi for the alleged incidents.

I considered the testimony presented at the evidentiary hearing, which failed to corroborate Mr. Fried's alibi. In addition, I reviewed the alibi testimony given at trial by defense witness Stuart Rudnick (later stricken from the record by the trial judge because of defense counsel's failure to file a notice of alibi defense), the other evidence presented at the trial, including, inter alia, the character and opportunity evidence presented by the defense witnesses and the evidence of defendant's other alleged sexual misconduct, and also the trial judge's findings regarding the relative credibility of the victim

and the defense witnesses as to the events of the days in question. After due consideration, I conclude that a reasonable probability does not exist that, but for trial counsel's failure to file a notice of alibi defense, the result of petitioner's trial would have been different. Therefore, I find that the second prong of Strickland is dispositive here, and the standards for finding ineffective assistance of counsel have not been satisfied.

**AND NOW** this        day of September, 1997, William J. Fried's Petition for Writ of Habeas Corpus is denied. There is no probable cause to appeal.

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Anita B. Brody, J.

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